United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-2150

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

THOMAS W. SEELER, Regional Director of the Third Region of the National Labor Relations Board, for and on behalf of the NATIONAL LABOR RELATIONS BOARD,

Petitioner-Appellant,

v.

THE TRADING PORT, INC.,

Respondent-Appellee.

B P/S

No. 74-2150

On Appeal from an Order of the United States District Court for the Northern District of New York

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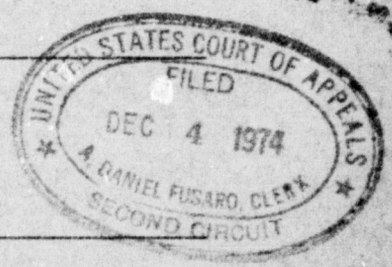

RESPONDENT-APPELLEE'S BRIEF

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v.

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THE TRADING PORT, INC.,

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The Issue

The issue is whether the court below committed reversible error in a Section 10(j) proceeding when, having enjoined The Trading Port, Inc., (herein "Trading Port"), (1) from interfering with, restraining or coercing its employees in the exercise of their Section 7 rights, and (2) to fill ensuing vacancies by first offering available positions - on a seniority basis - to employees not on the active payroll, it (3) declined to require that Trading Port recognize and bargain upon request with Teamsters Local 294, (herein "Union"), a union which had no existing bargaining relation with Trading Port and which Trading Port's employees had rejected twenty-five to three in an election.

Statement Of The Case

October 1, 1973, the Union filed a petition for an election; December 7, 1973, the Union filed objections to the outcome of that election; and, December 10, 1973, it filed unfair labor practice charges against Trading Port. January 8, 1974, the Regional Director issued a complaint against Trading Port and an order consolidating the representation and charge cases for hearing. (A. 2, 3)[1]

Approximately two and one-half months after issuing the complaint - on March 18, 1974 - the Regional Director filed his petition for a Section 10(j) injunction. (A. 1)

The court below issued its memorandum of Findings and Conclusions (A. 60-81) on June 4, 1974. (A. 80) June 24, 1974, the court below signed the order (A. 82, 83) from which this appeal has been taken.[2]

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[1] "A." refers to appendix pages. Page references without prefix are to the transcript of proceedings before the Administrative Law Judge.

[2] At page 3, note 3 of his brief, General Counsel notes that, on June 18, 1974 - subsequent to entry of the order from which this appeal has been taken - the Administrative Law Judge issued his decision in the consolidated representation and charges cases, a decision adverse to Trading Port and now pending before the Board on exceptions; and General Counsel has, "[f]or the information of the Court", submitted four copies of the Administrative Law Judge's decision. It may be wondered whether that submission is proper; we think it is not. If, however, this Court concludes otherwise, then it is only fair that the Court also have Trading Port's exceptions to the Administrative Law Judge's decision. Accordingly, for the information of the Court, we are submitting herewith four copies of Trading Port's exceptions to the Administrative Law Judge's decision.

(A) Events Preceding The Filing Of The Petition On October 1, 1973.

At page 36 of his brief, having noted that the district court's findings of reasonable cause to believe that Trading Port had engaged in conduct proscribed by Sections 8(a)(1) and (3) of the Act are not at issue on this appeal, General Counsel states that, "those findings are material to our position that (1) there is reasonable cause to believe that the Board will issue a remedial bargaining order in this case . . .".

Where, however - as here - a labor organization has lost an election, the Board will not direct recognition and bargaining unless the election is set aside upon meritorious objections filed in the representation case. Irving Air Chute Co., Inc., 149 NLRB 627 enf'd, 57 LRRM 1330, 350 F.2d 176, 59 LRRM 3052 (2d Cir. 1965). Moreover, those objections may only be based upon post-petition events. Goodyear Tire and Rubber Company, 138 NLRB 453, 51 LRRM 1070 (1962).

In these circumstances, it would seem that events preceding the filing of the petition are not material. However, pages 6 through 11 of General Counsel's brief deal with pre-petition events and pages 36, 37 and 44 lump pre- and post-petition events.

If those events were fairly stated, we would simply ignore them but they are not fairly stated.

(1) Sam Tabachneck's September 5 Speech To Employees

Sam Tabachneck testified that on September 5, 1973, between 2:30 and 3:00 P.M., at the warehouse, he addressed employees from a typewritten copy of a speech previously edited by counsel. (606-610) He told them he was going to read the speech because he didn't want to be misquoted or misunderstood, and that anyone who wanted a copy could have it. (610) Mr. Tabachneck read the speech, deviating from it only at the first paragraph of the third page to make a specific reference to office employees who were present and who would have no voice in deciding whether to strike but would nevertheless be hurt by a strike. (611) The text of Mr. Tabachneck's remarks is Respondent's Exhibit 3. (A. 36-38)

Employees recalled that he had a paper in his hand. (223) Employees Engel (144), J. Houck (186), Passino (198), Quigley (313-314), and Riddick (362) all testified that Sam Tabachneck said "a strike" - not "a union" - would hurt everyone including the office personnel.[3]

Only Dillenbeck (33-34) testified that Sam Tabachneck made any statement remotely resembling the threat of job loss if employees selected a union.

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[3]Sam Tabachneck did not say, as claimed at page 6 of General Counsel's brief, that things could be worked out without a union, and none of the record references cited by General Counsel support that statement.

Respondent's Exhibit 3 could not be construed by employees as threatening job loss or plant closure, as any fair reading demonstrates. Nor did the setting permit this interpretation. It was well known that a union meeting was scheduled for September 8, the meeting at which the employees were to vote whether to strike. (43, 49) Sam Tabachneck was urging the employees to file a petition, rather than strike, so the representation question could be resolved without economic loss to employer or employees; far from making a threat, he was making a plea to spare everyone the debilitating effects of a strike. It was an appeal to reason. After reading his text, Sam Tabachneck related a biblical parable and, in conclusion, told the assembled employees that his fate was in their hands. (611-613)

(2) Brunelle's Status In September

At page 7 of his brief, General Counsel set forth - as though it was fact - Dillenbeck's version of a purported September 6 conversation with Brunelle.

But counsel for the General Counsel failed to establish that Mr. Brunelle was either a supervisor or Trading Port's agent in September. (152, 202) To the contrary, the testimony of Avrum Tabachneck (446-451) and Mr. Brunelle (470-479), clearly established Mr. Brunelle was not a supervisor in September of 1973. Nor was there evidence of agency. Accordingly, whatever Dillenbeck's version of that purported conversation, it is not attributable to Trading Port.

(3) The Picket Line Exchanges Involving Isadore Tabachneck.

According to employees, and by his own admission, Isadore Tabachneck is a "kibitzer". (102, 135, 358, 618) He passed the time of day, engaged in jokes and teased on the picket line. (135) Employee Quigley testified that Mr. Tabachneck maintained a very good humor at the picket line, and, though upset about the situation, took it in stride. (299, 307, 308)

Asked what he heard Mr. Tabachneck say at the picket line, Mr. Dillenbeck said, "Mr. Tabachneck would say that we have killed his business, we might as well go home. He was going to Florida to live in a condominium. He was going to put padlocks on the warehouse. We would never come back to work again, and many statements of that same nature." (63) On another occasion, according to Mr. Dillenbeck, he said, "The same things -- you might as well go home; you're wasting your time here; there is no business left; you killed the business; there's no jobs left for you to come back to; padlocks are going on the doors." (64)

Mr. Valerio, asked about Mr. Tabachneck's statement, testified, "He said we had ruined him, the business was done, he was going to padlock the place."[4] (128)

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[4]The only way the "padlock" reference could conceivably be interpreted as a threat to close the warehouse is in total isolation. But that word was not used in isolation, it was preceded by the comment that the strike had ruined him, killed the business; and, since "the business was done", the pickets "might as well go home". In short, "padlocks" would be "going on the door", not because Respondent wished it, but because of the strike's effectiveness.

A further exchange with Valerio, acrimonious and bitter, had to do, not with union activity, but with Tabachneck's belief - rightly or wrongly - that Valerio had been dishonest in handling salvageable merchandise. Valerio testified that Isadore Tabachneck said, "I had a partner, I never realized it . . . . Somebody was robbing me blind, cleaning me out." (129) Valerio's testimony demonstrates he knew this exchange had to do with employment performance, not union activity. He said, ". . . I told him, I says out of all the people he had on his damage desk, I was the only one who never used it for a shopping center, and I said, thanks for the appreciation, and he just puffed on his cigar and walked away." (129) Mr. Tabachneck testified that he told Valerio, ". . . exactly what I thought of him and that he was robbing me blind." (621)

Employee Savage testified to two conversations with Isadore Tabachneck. In the first, Isadore Tabachneck said he wanted to thank all the men for helping him make up his mind about whether he was going to buy a condominium in Florida. (317) In the second, after Savage told Tabachneck he was looking for another job, Tabachneck, according to Savage, said, ". . . that's good because I probably wouldn't have mine if we went back." (318) Employee Savage had been a tractor-trailer driver, and Mr. Tabachneck's comment to him should be viewed in the context of the economic consequences the strike was visiting on Respondent and the decision that had been made to discontinue delivery. (316, 318)

Employee Riddick testified to the following conversation: "Well, he told me that we were foolish to be out here striking, and he said, 'You'll be out here until Christmas and I'll come out and build you a fire,' and that they had lost quite a few of their customers as a result of that strike -- about 30 or 40 percent of the business, I believe. . . . He said that because of that he wouldn't need all of us -- he wouldn't need all of us. He would only need about ten of us, that the rest were fired, that's what he said."[5] (364; Emphasis supplied.)

According to employee Deyss, Isadore Tabachneck - in the presence of Glenn Passino and his wife, Sharon - said ". . . I would take Glenn's wife, Sharon, back before I ever take you back, and she doesn't even work here."[6] (399-400)

At page 9 of his brief, General Counsel states - again as fact - Peasley's version of a conversation with Isadore Tabachneck. Peasley's testimony may not be considered. His entire testimony was stricken for misconduct on direct examination, and his testimony was later reinstated, by stipulation, solely with respect to his individual entitlement to reinstatement - not with respect to any other issue in the case. (191, 275-280)

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[5]Once again, the sequence is the strike's effectiveness causing a loss of customers, as a result of which, Respondent would require fewer employees.

[6]This was clearly picket line banter, and only a tortured interpretation could transform it into a threat.

(4) Trading Port's Discontinuance Of Its Health Insurance Premium Payment.

On or about September 29, 1973, Trading Port ceased paying its part of the medical insurance premium for previously covered employees who had not returned to work. As Mr. Dillenbeck testified, Respondent has a Blue Cross-Blue Shield contributory plan under which the employer and employees each contributed to payment of the total premium. (107)

Although the record does not expressly address itself to how Respondent's plan was administered, it is common knowledge - and therefore fair comment to note - that Blue Cross-Blue Shield invoices the employer; the employer periodically transmits a check in payment of the total premium; and, where the plan is contributory, the employees' share of the premium payment is deducted from current wages.

Since the plan is contributory and the employees' share of the premium expense is paid out of current earnings, it is essential to coverage that the employee be on the active payroll so that his share of the premium payment may be deducted from current wages.[7]

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[7]Mindful that an employer must treat strikers uniformly with non-strikers with respect to whatever benefits accrue from the existence of the employment relationship, it is nonetheless true that an employer is not required to finance a strike against himself and need not pay strikers for work not performed. Strike time need not be treated as work time in determining an employer's obligation to directly or indirectly compensate employees. Illinois Bell Telephone Company, 179 NLRB No. 119, 76 LRRM 1023 (1969), enf'd., 446 F.2d 815, 77 LRRM 2897 (7th Cir. 1971); Mooney Aircraft, Inc., 148 NLRB 1057, 57 LRRM 1133 (1964); General Electric Company, 80 NLRB 510, 23 LRRM 1094 (1948).

Medical insurance coverage is a form of compensation. Active employment is a condition of coverage where, as here, the plan is contributory. In his September 20 letter [General Counsel's Exhibit 5], Sam Tabachneck, informing employees that Trading Port would cease to pay its part of the premium due on September 29, very carefully advised them that no lapse or forfeiture need occur. His letter [General Counsel's Exhibit 5] states, in part, "We have no desire to hurt you or your family so, we will see to it that Blue Cross/Blue Shield gives you a chance to keep the insurance at your expense."[8]

(5) The Strike Ends

Avrum Tabachneck, Trading Port's secretary-treasurer and the son of Sam Tabachneck, Trading Port's vice president, became Personnel Director at about the time of the strike, a time when his father's health started to deteriorate. (430, 532, 533)

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[8]This is in marked contrast to a case discussed in General Counsel's Report of Case-Handling Developments in Labor Relations Yearbook - 1969, BNA, pp. 487-488. There, the employer maintained a group of insurance plan, premiums being deducted from a participant's earnings and paid over to the insurance carrier by the employer. With the advent of a strike and cessation of wage payments, the employer had no occasion to deduct from earnings and forward the insurance premiums. However, the employer there, instead of notifying strikers that they might continue their coverage, failed to respond to their inquiries and made it impossible for them to continue their insurance coverage. General Counsel authorized a complaint on the critical basis of the employer's failure to afford the strikers the opportunity to continue their participation in the plan. In doing so, General Counsel noted the employer was not obligated to "finance" the strike by paying these premiums for the strikers.

Trading Port had hired two replacements during the strike. (553) Learning the strike was to end, Avrum Tabachneck consulted counsel. (533) Counsel advised him to dismiss the replacements, to select the rest of the work force from among those who had remained on strike, selecting employees on any basis he wanted except their participation in union activity. (534) The replacements were let go. (535)

At pages 11 and 39 of his brief, General Counsel states - again as fact - that Sam Tabachneck agreed and promised to take strikers back by seniority. The court below correctly noted, "There is conflicting testimony as to whether the company agreed to rehire the strikers by seniority, assuming there was work, but the strike was ended." (A. 67)

When, on September 29, the Tabachnecks learned the strike was to end, and employees Dillenbeck and Houck raised the question of recall by seniority, Sam Tabachneck testified, "I told them I knew nothing about any seniority and that I wouldn't commit myself without advice of counsel." (615)

October 1, 1973, when employees previously on strike reported to the office, their names, addresses and telephone numbers were taken so that, if and when business picked up, they could be recalled. (535)

(B) Events Following The Filing Of The Petition On October 1, 1973.

(1) The October 8 And November 15 Conversations Among Avrum Tabachneck, William Brunelle, And Charles Ballou.

(a) The October 8 Conversation

According to Mr. Ballou, he was at the union hall with a co-employee, Richard LeBlanc, who wanted to stop at the warehouse and speak with Avrum Tabachneck. (233) Mr. Ballou testified he joined him, waited in his car at the warehouse for about an hour, then went in and saw that Mr. LeBlanc - in Avrum Tabachneck's office with him and Mr. Brunelle - was just about finished; and, when Mr. LeBlanc got up to leave, Avrum Tabachneck asked Mr. Ballou if he would sit down and speak to him for a minute; he did. (233, 234)

Before turning to that conversation, it is appropriate to relate the testimony of Richard LeBlanc concerning events preceding it, especially in light of Mr. Ballou's flat denial that he made any stop between the union hall and the warehouse and his equally emphatic denial that he had anything intoxicating to drink that day, prior to the conversation. (253-254, 254)

Richard LeBlanc, a Trading Port employee and a striker, testified that, sometime between October 1 and 29, he was at the union hall with Mr. Ballou, when, about midday, they drove to the Orchard Grill. (524) Mr.

LeBlanc saw Mr. Brunelle there, had a conversation with him, and then decided to cross the street and talk to Avrum Tabachneck. (525)

He and Mr. Ballou had been at the Orchard Grill about a half hour during which Mr. Ballou was drinking beer. (525) Mr. LeBlanc spent approximately an hour talking with Avrum Tabachneck. (526) Mr. Ballou was in Avrum Tabachneck's office talking as Mr. LeBlanc left and returned to the Orchard Grill where he remained for five or ten minutes before coming back to tell Mr. Ballou he was leaving; he knocked on the office door, went in, told Mr. Ballou he was leaving, and left without him.[9] (528)

Mr. Ballou testified that Avrum Tabachneck asked him how the men on strike felt and how they would go in the election. (234) Mr. Ballou said he wanted the union but couldn't speak for the others, and Mr. Brunelle asked if there was any possibility of settling matters without the Union by having a grievance committee; Mr. Ballou said he didn't think so but couldn't speak for the others. (234)

Avrum Tabachneck testified that he was in his office with Mr. Brunelle, finishing their conversation with Mr. LeBlanc, when an office girl said

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[9]General Counsel's objections to Respondent's counsel's questions seeking to elicit the witness LeBlanc's opinion of Ballou's condition when he left him at the Orchard Grill and when he saw him later at Trading Port were - albeit improperly - sustained. (526, 527)

someone was waiting to see him, and Mr. Ballou came in. (546) The conversation started about a sporting event, a proposed bet on it and Mr. Ballou's statement he would give Mr. Tabachneck odds; when Mr. Tabachneck responded by asking the odds on the election, Mr. Ballou expressed his opinion that the union would win, and Mr. Tabachneck said, "Well, that's one opinion." (547) Mr. Ballou said he would prefer forty-three friends to forty-three enemies, and repeatedly said, "Luke can tell you, I'm no dummy." (547) There was no conversation about the election, the Union, or anything connected with them. (548)

Mr. Tabachneck observed that Mr. Ballou's manner of speech was abnormal, and Mr. Tabachneck formed and expressed the opinion that Mr. Ballou was definitely under the influence of alcohol.[10]

Mr. Brunelle testified that Mr. Ballou arrived and started talking about a baseball bet. (592) Mr. Tabachneck asked the odds, and Mr. Ballou said, "Oh, the union will win." Mr. Tabachneck said that was Mr. Ballou's opinion. (593) Saying he didn't want to get into a long subject, Mr. Ballou said that Mr. Brunelle knew he [Ballou] valued friendship and would rather have forty-three friends than forty-three enemies. (593)

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[10] Mr. Tabachneck taught alcohol education for several years and served as Chairman of the Schenectady County Alcohol Education Program for two years. (555)

He asked Mr. Tabachneck about returning to work, and Mr. Tabachneck told him as soon as there were job openings, people would be called back. (593) Mr. Ballou thanked them for their time and left. Nothing further was said. (593-594)

Mr. Brunelle testified he had seen employees Ballou and LeBlanc in the Orchard Grill about 11:45 A.M., and the conversation with Mr. Ballou at Trading Port took place around 1:30 P.M. (594) Asked his opinion of Mr. Ballou's condition, Mr. Brunelle said, "There's no question in my mind that he was under the influence of alcohol." (594, 595)

(b) The November 15 Conversation

Mr. Ballou testified that, November 15, he went to the warehouse to pick up some clothing and then spoke with Avrum Tabachneck. (235) He asked Mr. Tabachneck if he had enough time to collect unemployment insurance. He asked Mr. Ballou to come in and talk. He then asked him if he was going to be at the election, if he was still strong on the union, was he still going to vote for it, why he wanted it and how the men on the outside would vote. (236) Mr. Ballou said he would be at the election, he was going to vote for the union, he wanted it for benefits, and he had no idea how the men on the outside would vote. (236) As Mr. Ballou was leaving, Mr. Tabachneck said that if he could find a way not to come to the election, he [Mr. Tabachneck] would keep Mr. Ballou in mind for employment after the election; he also said it didn't matter how Mr. Ballou voted because there would never be a union there. (236)

Avrum Tabachneck testified that he had a conversation with Mr. Ballou in mid-November, on a Thursday, a pay day. (552, 553) Mr. Brunelle was present for part of that conversation. (553) It occurred in the middle of the main office. Mr. Ballou wanted to come into Mr. Tabachneck's office and talk with him, but Mr. Tabachneck could smell alcohol on his breath and didn't want to get involved. Accordingly, he said they would talk right there. (553) Mr. Ballou asked Mr. Tabachneck if he would change his employment date so he could qualify for unemployment insurance, and Mr. Tabachneck said he couldn't do that. (553-554) Mr. Ballou asked where the election was going to be held, and Mr. Tabachneck pointed out the location, in the process asking him if he thought he would be in shape to make it. (554) Mr. Ballou, according to Mr. Tabachneck, told him not to worry about it and that he would see him on December 4. (554)

Avrum Tabachneck expressed the opinion that, during this conversation too, Mr. Ballou was under the influence of alcohol. (555) On his way out, he mentioned to Mr. Brunelle that he was going to see employee Dambrose in the warehouse. (554) Nothing else was said. (554)

Casper Dambrose testified that, after the end of the strike and before the election, he saw Mr. Ballou at the front desk in the warehouse and had a conversation with him. (599, 520) The subject of that conversation was $6.00 that Mr. Ballou claimed Mr. Dambrose owed him as the result of an alleged bet. (520) Mr. Dambrose and Mr. Ballou were two feet apart

when that conversation occurred.[11] (520)

Employee James Allen testified that, between the end of the strike and before the election, he saw Mr. Ballou at the warehouse front desk talking to Mr. Dambrose or Mr. Mason. Mr. Allen was a couple of feet away from them.[12] (511)

Mr. Brunelle testified he was in the main office sometime in mid-November when Mr. Ballou entered. He said he would like to talk to Avrum Tabachneck, and Mr. Tabachneck told him to sit down there. According to Mr. Brunelle, Mr. Ballou said, "I was wondering if you could do something about my unemployment slip. I am a few days short. Can you change the date so I can collect unemployment?" (595) Avrum Tabachneck said he couldn't do that. (596) Mr. Ballou then asked where the election was going to be held; Mr. Tabachneck pointed to the area and, in a kidding manner, asked Mr. Ballou if he thought he was going to make it in the condition he was in. (596) Mr. Ballou told him not to worry, that he would be there on December 4. (596) As he was leaving, Mr. Ballou said he had to go out to the warehouse and talk to employee Dambrose. (596)

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[11] On Trading Port's direct examination of the witness Dambrose, General Counsel's objections were improperly sustained to questions concerning Mr. Ballou's manner of speech, facial expression, odor and the witness' opinion whether Mr. Ballou was under the influence of alcohol. (520, 521)

[12] On Trading Port's direct examination of the witness Allen, General Counsel's objections were improperly sustained to questions about the way Mr. Ballou spoke and the witness' opinion whether Mr. Ballou was then under the influence of alcohol. (513, 514) An offer of proof that Mr. Ballou was under the influence of alcohol was made. (517)

According to Mr. Brunelle, Mr. Ballou put one cigarette he was smoking in an ashtray, and within thirty or forty seconds, lighted another one and smoked that, depositing his ashes in a desk drawer. Mr. Ballou's breath smelled, and it was Mr. Brunelle's opinion too that he was under the influence of alcohol. (599-600)

(2) The October 15 Conversation Between Avrum Tabachneck And Glenn Passino.

Mr. Passino testified that he went to the warehouse about two weeks after the strike and spoke with Avrum Tabachneck and Mr. Brunelle. (211) They spoke about the employees who had returned to work, and Mr. Passino brought up the subject of the election, saying ten of the eighteen then working would probably vote for the Union. (212) Avrum Tabachneck said he doubted it. (212) According to Mr. Passino, Avrum Tabachneck then, "sort of, like was asking" how Mr. Passino would vote. (212) When Mr. Passino told him he was uncertain, Mr. Tabachneck said it was hard for him to believe. (212)

Mr. Passino testified that Avrum Tabachneck, discussing when employees would return to work, referred to the employees who had returned to work during the strike and said Respondent had to respect their rights before taking others back. (215)

Avrum Tabachneck testified he had a mid-October conversation with Mr. Passino in Mr. Brunelle's presence. (558) It started, however, at a desk in the warehouse. (558) Messrs. Brunelle and Dambrose came into Avrum Tabachneck's

office to say that Mr. Passino was in the warehouse; he said he was going to blow people's heads off; they had asked him to leave but he was still there; and they asked Mr. Tabachneck to come into the warehouse. When Avrum Tabachneck entered the warehouse, Mr. Passino said he was looking for him, and Mr. Tabachneck escorted him out of the warehouse to his office where, with Mr. Brunelle present, a conversation took place. (559) Mr. Tabachneck testified that Mr. Passino wanted to know why he hadn't been called back to work, saying he thought he was a much better worker than most of those working. (560) Mr. Tabachneck told him that if and when business picked up, people would be recalled as needed. (560)

Mr. Brunelle testified he was present during that conversation but did not speak (590); and, in response to the Administrative Law Judge's question, he testified that Mr. Tabachneck's version of the conversation was "substantially correct". (589)

Mr. Brunelle denied having the conversation with Mr. Passino to which General Counsel's brief, page 13, paragraph 2, refers. (590, 591)

(3) <u>The November 27 Conversation Between Avrum Tabachneck And John Robinson</u>.

John Robinson, a Trading Port employee, striker and picket, one of the directors of the union's September 8 meeting, and one of three employees who accompanied the Union's representatives to Trading Port's office

September 8, when the strike was announced, and September 29, when it was ended, was returned to active employment October 29, 1973. (44, 52, 68, Joint Exhibit 2)

On November 27, at Mr. Robinson's instance, a conversation occurred with Avrum Tabachneck at the warehouse. (386, 562) Prior to this conversation, Avrum Tabachneck had spoken to Mr. Robinson about his tardiness and absenteeism. (562-563) He had also sent him a warning letter. (390-391)

Mr. Robinson testified he asked to speak to Avrum Tabachneck about his tardiness, explained why he had been late and mentioned his brother - a Trading Port employee not then on the active payroll - had inquired about the prospects of coming back to work. (386, 387) According to Mr. Robinson, Mr. Tabachneck said he could do nothing at the present time but would feel obligated to Mr. Robinson's brother if he didn't show up for the election; and, saying he had previously asked someone to find out how John Robinson was going to vote, he said, "Well, I'll ask you point blank, how are you going to vote?" (387) Mr. Robinson did not reply. (387)

Avrum Tabachneck testified that, approximately one month after Mr. Robinson returned to active employment, Mr. Robinson asked to speak to him at the front desk in the warehouse. (562, 563) Mr. Robinson said he wanted to explain why he had been late and related a problem involving his daughter and school; Mr. Tabachneck observed that it didn't explain why he hadn't been back from lunch on time since he returned to active employment. (563)

According to Mr. Tabachneck, employee Robinson then asked if there was any chance of his brother being recalled, and, he said, "John, if there's business for people, we can call them back. And when we call them back, we'll call them back by their abilities." (563) In response to that statement, John Robinson asked if it would do "him" [Robinson's brother] any good if he voted against the union or didn't show up for the election, and Avrum Tabachneck reiterated that people would be called back as they were needed. (563, 564) That was the complete conversation. (564)

(4) Isadore Tabachneck's Statements On November 30 At The Orchard Grill

During noonhour, on November 30, 1973, the Friday before the December 4 election, at the Orchard Grill, Isadore Tabachneck made statements to several employees. (85, 86)

Mr. Dillenbeck testified that he and employees Ballou, Stockwell, Bishop and Frank Houck, Jr. were there when Avrum and Isadore Tabachneck, Mr. Brunelle and Mr. Menino, of G. E. X. Department Store, entered. (86) Mr. Dillenbeck testified that Isadore Tabachneck told him he would never be back at Trading Port; he was doing fine without him; and his crew was doing much better work than employee Dillenbeck could ever do. (86) He then stated to Mr. Ballou that he might as well hang around the race tracks or become a jockey since he wasn't coming back to work; and, shaking his cigar at Mr. Ballou, Isadore Tabachneck said, "'You know that

White Owl commercial,' he says, 'we're going to get you.' He also stated that we were going to lose the election." (86-87) In response to Judge Constantine's question, Mr. Sheridan said he did not claim the last quoted sentence was an unfair labor practice; neither, in our judgment, is the first. Assuming, without conceding, that Mr. Dillenbeck's version is correct, "We're going to get you", in the context described by the witness, is nothing more than another way of predicting a union defeat in the election; it would be total distortion to construe the infectious language of that television commercial as any kind of threat; and Mr. Ballou had previously seen the White Owl commercial. (258)

Mr. Ballou testified that Isadore Tabachneck showed him a check for a large sum which Mr. Menino had won on a $2 bet and said that was the way to win on the horses. (240) He then told Mr. Ballou he might as well make his living on the horses because he was not going back to Trading Port. (240) Mr. Ballou also testified he heard Isadore Tabachneck tell employee Dillenbeck - while pointing to F. Houck, Jr. and Robert Bishop - that they were doing the work of any three or four men. (240) He then said he would not have to worry about Messrs. Ballou and Dillenbeck after Tuesday; and, in leaving, held up his cigar, directed it at Mr. Ballou and said, "'We're going to do to you like the cigar commercial - what is it - White Owl, we're going to get you.'" (240)

Robert Bishop testified that Isadore Tabachneck, talking to Mr. Dillenbeck and him, said, "About the outside; there was no hard feelings on how this thing went and the election went. He did say to Mr. Dillenbeck, he was very

frank with him - not hostile in any way - but he didn't think he'd be back in the warehouse regardless of how this thing went." (355)

(5) Trading Port Had Legitimate And Substantial Business Justification For Not Returning Employees To Active Employment On October 1, And For Notifying Certain Employees On November 1 That Positions Were Not Available.

Dr. Jerome Morenoff, whose professional competence was conceded (671), has been connected with Trading Port since 1965, and heavily involved in its affairs since 1968 or 1969, as a Trading Port director and President of Ocean Data Systems, Trading Port's computer facilities manager. (635, 636)

Dr. Morenoff traced the events which ultimately led to Sam Tabachneck's sending his November 1, 1973, letter [General Counsel's Exhibit 6 (A. 25)] to the employees referred to in footnote 1 of Joint Exhibit 1. (A. 28) Prior to 1968, Trading Port did not deliver warehouse merchandise to its customers. (640) Its principal customers in 1968 were independent grocery retailers in the Albany area. (636) Trading Port was their primary supplier. (637) When, in 1968, Trading Port sought to expand its business with independent retailers, it met with little success. (637)

In these circumstances, Trading Port decided to look for new sources of revenue, principally the chain stores in and out of the Albany area, chains having their own warehouses but which Trading Port could serve as a secondary

or out-of-stock supplier.[13] Trading Port became that type supplier for four chains and started relying on them as their demands and volume grew. (639) They came to represent fifteen to twenty percent of Trading Port's business. (640)

In late 1972, Trading Port's board of directors undertook to assess Trading Port's business situation; it recognized that some customers were a detriment; it questioned the profitability of Trading Port's delivery business; and, most important, the board concluded it lacked the statistical data required to make intelligent business decisions. (641, 641)

Accordingly, the board decided it would cause statistics to be compiled on a monthly basis so that it could properly assess the characteristics of the warehouse and delivery operations and analyze the customer base. (641)

As these statistics became available, management began to assess the way Trading Port was conducting its business; and customer analysis was undertaken with an eye toward becoming more selective. (648) Trading Port decided it would cease doing business with slow-paying, poor-risk customers and customers which required Trading Port to carry a multiple line of goods or excessively large inventories. (649) Trading Port analyzed monthly statistics looking for ways to streamline management and reduce overhead; and, for the first time, Trading Port developed data relating to how many cases an average warehouse employee could be expected to handle per month. (651)

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[13]The chains are known in the trade as "sharp", customers likely to give a wholesaler little or no profit but nonetheless advantageous to the extent of increasing Trading Port's buying power and maintaining job stability. (638, 639)

In early spring of 1973, the price of food and related products rose astronomically; items became difficult to get; Trading Port's out-of stock percentage rose from three percent to almost fifteen percent; and the chain stores began "cherry picking", that is, taking all Trading Port's irreplaceable items out of stock. (642)

During the first half of 1973, many of Trading Port's independent retailer customers were having tremendous cash problems. (643) Money was becoming extremely tight and costly; interest rates soared to almost ten percent by summer. (644) Unwilling - at the high prevailing interest rate - to borrow the capital required to hedge its purchases, Trading Port found itself unable to hedge and thereby lost business. (645) At the same time, two large out-of-town wholesalers moved into Trading Port's area, P & C and Springfield Sugar.[14] (643, 645)

The chain stores became increasingly difficult for Trading Port to maintain since, in addition to their inventory demands, payment to Trading Port originated from their home offices; payment occurred three to four weeks after delivery, a long time for a business the size of Trading Port with its cash flow problem. (649, 650)

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[14]Trading Port deals primarily in groceries while P & C and Springfield Sugar offer a broader spectrum: cosmetics, drugs, and financial consulting services for the retail food industries. (652) Their entry into the area represented severe competition. (643)

The energy crisis initially manifested itself in August of 1973, and, by August 31 letter [Respondent's Exhibit 4 (A. 39)] Trading Port was informed that, due to the increase in the price of fuel, the vehicle mileage rates on its leased vehicles would be increased effective September 6. That letter was the proverbial "straw that broke the camel's back", the final factor that led to Trading Port's decision to cancel the truck leases and get out of the delivery business altogether. (647) September 10, 1973, by letter [Respondent's Exhibit 5 (A. 40)], Sam Tabachneck informed Colonie Truck Leasing Co., Inc., ". . . we are exercising our cancellation clause as per our contract with you." During the week prior to his writing that letter, customers were contacted by phone and informed that Trading Port was discontinuing deliveries. (673) Except for deliveries to its own retail stores, Trading Port went out - and is out - of the delivery business completely. (676)

Respondent's Exhibit 6 (A. 41) is a sales, purchases and operational cost analysis. The sales analysis shows that during September, the month of the strike, sales were at their lowest level of the fourteen months covered by the analysis; sales were down almost $550,000 from the previous September. (663) The sharp rise in October sales was not due to many customers returning to Trading Port but was due to the fact that several of the larger chains and others came in and hauled out massive amounts of inventory. (663) The purchases analysis shows a tremendous increase in November of 1973, reflecting that there were no deliveries of products into

the warehouse during September, and the impact of Trading Port's purchasing was not evident until November. (664) The operational cost analysis, column 9, shows the total cases handled per warehouse employee each month since January, 1973. (665) The average number of cases handled per man per month during the first eight months of 1973, that is, before the strike, was 12,361.

Respondent's Exhibit 7 (A. 44-56) is an updated version of the customer analysis which began in January, 1973. (665) It is the basis on which Trading Port projected its sales for November and December, 1973, and for the following twelve months. (665) Phase A, covering November and December, 1973, is a catch-up period, a period during which Trading Port concluded its business would be influenced by the effects of the strike; Phase B, January to December, 1974, is the level which Trading Port expects to attain. (666) Using the customer analysis, Trading Port projected the maximum average monthly case sales for each customer in both Phase A and B periods. (666, 667) Trading Port projected it would be handling 140,000 cases per month in Phase A and 175,000 cases per month in Phase B. (668) These are maximums.[15] (669)

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[15]There were customers whose business Trading Port could not retain without delivering. Some customers had gone bankrupt. (669) Others were eliminated when Trading Port adhered to its long-standing but often unenforced policy of requiring a minimum of 100 cases per order. (650)

Respondent's Exhibit 8 (A. 57) is a summary of salient data derived from Respondent's Exhibits 6 and 7. Dividing the projected production level, that is, cases handled per man per month, into the projected total maximum number of cases handled, discloses the projected maximum number of warehousemen required to handle cases for the fourteen month period; and the projections were fairly accurate to the date of the hearing.[16] (670)

Respondent's Exhibit 9 (A. 58, 59) a delivery and telephone cost analysis, discloses that Trading Port lost $19,627 on deliveries the first eight months of 1973; and, at that rate, it would have lost another $10,000 in the last four months of 1973. (670) Long-distance collect telephone calls from delivery customers averaged $225 monthly, almost $3,000 per year. (670, 671)

Respondent's Exhibit 8 demonstrates the accuracy of the projected total maximum number of cases to be handled and projected production levels; and it conclusively demonstrates that Trading Port is employing the actual number of warehousemen required to handle the actual total cases handled.

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[16]Since the 1973 pre-strike average case handling per man per month was 12,361, the projected production levels of 12,000 cases in Phase A and 13,000 cas in Phase B are reasonable. Actual production may fall below simply y reason of lack of business. However, as Respondent's Exhibit 8 shows, the Phase B projected production level was very nearly attained in January, 1974, and, the January - February, 1974 average production level was 12,300 cases per man per month, corresponding to the pre-strike experience of 12,361 cases per man per month, all of which indicates that Trading Port has a full complement of warehousemen for the volume of business it is doing.

Trading Port's projections were made the last few days of October, 1973. (667) Having determined that the warehouse was now fully staffed to handle the projected maximum business volume for the next fourteen months, Sam Tabachneck wrote his November 1 letter [General Counsel's Exhibit 6, (A. 25)] advising employees of the permanent reduction in force.[17]

Respondent's Exhibit 6 itself demonstrates that Trading Port was adequately staffed when the strike ended and it issued layoff slips.[18] The district

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[17] If, after a strike ends, an employer declines to reinstate striking employees, he is guilty of an unfair labor practice unless he can show legitimate and substantial business justification for his action; the burden or proving justification is on the employer. When jobs have been eliminated for substantial and bona fide reasons other than considerations relating to labor relations - for example, the need to adapt to changes in business conditions or improve efficiency - that constitutes justification. Laidlaw Corp., 171 NLRB 1366, 68 LRRM 1252 (1968), enf'd., 414 F.2d 99, 71 LRRM 3052 (7th Cir. 1969), cert. den., 397 U.S. 920, 73 LRRM 2537 (1970); NLRB v. Fleetwood Trailer Co., Inc., 389 U.S. 375, 66 LRRM 2737 (1967) Dr. Morenoff's uncontradicted, objective and statistically supported testimony firmly established that Trading Port had legitimate and substantial business justification for its decisions and actions.

[18] The sales and purchases analyses for October reveals 232,724 cases handled; dividing that by the 12,361 case average handled during pre-strike 1973 results in the conclusion that nineteen warehousemen were needed; and, as Respondent's Exhibit 6 shows, the average number of warehouse employees during October was twenty-one.

court acknowledged this. (A. 75)

The testimonial evidence confirms that documentary evidence. Sam Tabachneck testified that when, on September 29, Union President Robilotto said he wanted all the men to report Monday morning, he replied, "Well, there was no business. There was no work. There was no freight coming in. Everything -- all freight coming in was cancelled and there was no customers. And it would be silly and ridiculous to have these men report to work because there just was no work for them to do." (614-615)

In these circumstances, Mr. Robilotto said they should report for layoff slips in order to qualify for unemployment insurance benefits, and that is precisely what was done. (615, 133, 162, 176, 185, 208, 266, 365, 370, 374, 400, 417)

October 1, 1973, at the Trading Port office, Avrum Tabachneck had the employees write their names, addresses and phone numbers on a list; layoff slips were issued; and employees were told that business was off and they would be called back if and when business picked up. (133, 162, 176, 185, 266, 365, 370, 400, 417, 535)

As business picked up, employees were called back. Joint Exhibit 2 (A. 29) lists ten employees who returned to active employment after the strike and the dates of their return.[19]

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[19]As the district court correctly noted, strikers were not returned to the active payroll on a seniority basis. (A. 67, 71) The last line of note 8 at page 14 of General Counsel's brief erroneously states that "seniority was followed in the recall."

(6) Counsel For The General Counsel Failed To Sustain His Burden Of Proving That Trading Port Followed An Unlawful Discriminatory Policy In Returning Strikers To Available Positions.

Avrum Tabachneck testified that his objective, in selecting individuals for return to active employment, was to get the best person for the job, a good worker, a versatile worker, a person who knew and enjoyed his work, who had a good attitude toward Trading Port and his job; rate of pay also played a part. (541-542, 588)

October 3, 1973, William Brunelle became warehouse manager - and, as stipulated, a supervisor. (117, 587) During October, he and Avrum Tabachneck had many conversations about personnel; Avrum asked - with respect to each individual - whether he was a good worker, versatile, had a good attitude toward his job, and his rate of pay. (588) They discussed all employees who were not on the active payroll. (588-589)

Howard Flagler testified there came a time after the strike when he had a specific conversation about a need in the warehouse for personnel to operate forklifts.[20] (498-499)

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[20]Counsel for the General Counsel objected to the content of that conversation and his objection was sustained. (498-499) Trading Port offered to prove Avrum Tabachneck asked employee Flagler who were the best qualified forklift operators and he said that employees Bishop and F. Houck were best qualified. (500-501)

Avrum Tabachneck testified that Mr. Brunelle said Trading Port needed fork-lift operators, and they agreed employees Bishop and F. Houck were the best available. (536, 537) R. Bishop returned to active employment on October 9, and F. Houck on October 10, 1973. [Joint Exhibit 2 (A. 29)] They were the first employees to return after the strike. (537)

During October, Avrum Tabachneck testified he spoke not only with William Brunelle and Robert Solomon, supervisors, but also with rank-and-file employees Allen, Bahan, Dambrose, Flagler, Harter, and possibly others, to obtain their evaluations of the employees available for recall.[21] (536)

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[21] Once more, counsel for the General Counsel objected to the contents of these conversations with rank-and-file employees, and his objections were sustained. (507, 538) Respondent offered to prove that, in the conversation with employee Harter, he expressed the opinion that the ten employees later recalled to active employment were 99% of the better people. (507-508) It was stipulated the conversations with rank-and-file employees generally followed the line of the offer of proof made on the testimony of Mr. Dambrose. (518-519, 539) The testimony Trading Port sought to elicit from rank-and-file employees concerning their conversations with Avrum Tabachneck was competent - not, as ruled, hearsay - since it was offered on the issue of Trading Port's procedure in selecting employees for return to work rather than on the issue of the truth or falsity of statements made in those conversations. (489-501, 506, 507, 538, 539) Fisch on New York Evidence §761. As Richardson on Evidence §209 states:

> "Where the mere fact that a statement was made, as distinguished from its truty or falsity, is relevant upon trial, evidence that such statement was made is original evidence, not hearsay. In such a case, the hearsay rule has no application, for the statement is not offered as a testimonial assertion; that is, it is not offered for the truth of the fact asserted in the statement. Wigmore on Evidence, 3d Ed., secs. 1789, 1790."

Counsel for the General Counsel below having successfully excluded - on the Administrative Law Judge's erroneous rulings - highly probative and corroborative testimony by rank-and-file employees as to the non-discriminatory procedure Trading Port followed in selecting employees for return to work, General Counsel in this Court, at page 40 of his brief, unfairly asserts that Trading Port recalled only those employees who in ". . . the opinion of newly appointed warehouse manager Brunelle, a man who had not worked closely with the warehouse personnel during the prior two years . . ." had "a 'good attitude toward the Company'".

Between October 10 and 29, 1973, Avrum Tabachneck and William Brunelle had several conversations about employees not yet returned to active employment. (539) They reviewed the status of the business, how fast work was picking up, how many people were needed, what type, how most of their time would be spent, who would be best suited, the type job to be filled, and the individual employees not yet returned.[22] (541) In consequence of these conversations and the pace of the business, employees were recalled between October 29 and December 27, 1973. (541)

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[22] In Santa Rita Mining Co., 200 NLRB No. 144, 82 LRRM 1122 (1972), as here, the employer had no policy of adhering to seniority on layoff and recall. The Board there acknowledged the relevancy and materiality of evidence that the employer considered the comparative capabilities of terminated and retained employees.

Counsel for the General Counsel did not subpoena Trading Port's records for 1971, when a layoff occurred. Instead, on his case, employeesDillenbeck and Ballou testified that seniority was followed in that layoff. (93, 227)

That testimony was false; seniority was not followed, and Respondent's records proved it. The district court acknowledged this. (A. 73)

Trading Port's Comptroller, Elli Benno, testified that there were sixty-eight employees in the unit in 1971, and twenty-one were affected by the layoff. (581, 583) Respondent's Exhibit 1 (A. 33) is based on corporate records. It identifies the employees who were laid off, sets forth their layoff dates and their order of hire. According to Avrum Tabachneck, Robert Solomon, the warehouse manager in 1971, selected those who were laid off. (571)

Avrum Tabachneck testified there was no seniority policy at Trading Port, but hiring date played a minor role in vacation selection; eg, if two employees wanted vacation at the same time, the employee with the earlier hiring date would have the preference if it couldn't be resolved any other way. (535-536)

Moreover, Trading Port was faced with what was for it an unprecedented situation: the need to permanently reduce its work force; and it was entitled to select the best among its employees for retention in such a reduced work force. Discrimination to bring about that result is not unlawful discrimination within Section 8(a)(3) of the Act.

Indeed, Trading Port contends it would have been entitled to select on a merit basis in affecting its permanent reduction even if its past history had shown that seniority was followed in connection with temporary layoffs and recalls. But its history - not only according to the testimony of its principals but by documentary evidence, its corporate payroll - shows that seniority was not its policy on layoff and recall.[23] (535-536)

Trading Port had - as required by law - accorded preferential hiring treatment to those employees who had received its November 1 letter informing them that positions were not available.[24] (A. 28, note 1)

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[23]In the face of that documentary evidence, the Administrative Law Judge nevertheless said, "In any event I find that Respondent followed seniority after 1971." (ALJD p. 39, lines 7-8; Emphasis supplied.) He made this statement when there is no record evidence of any layoff after 1971; when none of the twenty-six employees who testified claimed that seniority was Trading Port's policy, although two of them - Dillenbeck and Ballou - had falsely testified that seniority was followed in the 1971 layoff.

[24]General Counsel, at page 19, note 10 of his brief, informs the Court that, after the Administrative Law Judge issued his decision, Trading Port recalled the twenty strikers who were permanently laid off. Their recall had nothing to do with the Administrative Law Judge's decision but came about as openings developed in the work force; nor did it come about by reason of any need for an expanded work force. Had the court below ordered immediate reinstatement of all strikers, Trading Port would have appealed and contended that such an order constituted reversible error.

(C) The District Court's Denial Of An Injunction Directing Trading Port To Recognize And Bargain With The Union Pendente Lite.

Addressing itself to the request for recognition and bargaining by temporary injunction, the court below said (A. 77-79):

> "Whether the Employer should be ordered at this time to recognize and bargain with the Union stands on a different footing. The election was not close, and while the Board may well direct a new election and may well find the election results tainted by the Employer's coercive conduct, it is not clear that the outcome of a new election would necessarily be different.
>
> > '[T]o grant injunctive relief which, in effect, would require respondent to bargain with the Union, would actually disregard the status quo and create a bargaining agreement which does not now exist. This is not a case where existing bargaining relations between a Union and a company which are interrupted by an allegedly unfair labor practice, are continued by injunctive relief pending the outcome of the legal matter before the Board. The Court finds that petitioner in the instant case seeks to create a collective bargaining relation through an injunction. The set of rights and duties imposed does not exist and can not be determined to have existed until the Board resolves the case.' Fuchs v. Steel-Fab, Inc., 356 F.Supp. 385, 387 (D. Mass. 1973).

See, McLeod v. Gen'l Elec. Co., 257 F.Supp. 690, rev'd., 366 F.2d 847 (2d Cir. 1966), which the Supreme Court set aside and remanded, 385 U.S. 533, for further consideration by the District Court in light of supervening events, without deciding the appropriate standard for granting a bargaining order in a 10(j) proceeding. Clearly, neither the need for a showing of grave impact upon the public interest test applied by the District Judge in ordering bargaining in that case, nor the test applied by the Second Circuit in reversing the order to bargain, which requires a showing of irreparable harm or necessity to preserve the status quo, has been met here. We have been cited to no cases, nor have we found any in this Circuit, in which bargaining has been ordered in a 10(j) proceeding when no previous bargaining relationship existed.

. . . If this Court were to order bargaining now, it would be deciding the very issues before the Board and usurping the power given the Board under the Act. . . .

. . . An order compelling bargaining based merely on the cards, should not issue from this Court, because:

> 'it has not the intrinsic quality of preserving the status quo or keeping intact the subject matter which is before the Labor Board for adjudication, and . . . it would invade an area exclusively preserved to the administrative-legislative adjudicatory powers of the Board." Kaynard v. Lawrence Rigging, Inc., 80 LRRM 2600, 2604 (E.D.N.Y. 1972)."

Argument

(1) For A Bargaining Order To Issue, The Election Must First Be Set Aside On Meritorious Objections, And There Is No Probable Cause To Believe That The Board Will Set The Election Aside.

The petition was filed October 1, 1973 (270); the election was held December 4, 1973 (85); and these dates demarcate the critical pre-election period.

In Irving Air Chute Co., Inc., 149 NLRB 627, 57 LRRM 1330, enf'd, 350 F.2d 176, 59 LRRM 3052 (2d Cir. 1965), the Board said:

> "We held in that case [Bernel Foam Products Co., Inc., 146 NLRB 1277, 56 LRRM 1039 (1964)] that a labor organization which loses an election may nevertheless seek bargaining relief under Section 8(a)(5) of the Act or Section 8(a)(1) in appropriate circumstances, where it appears that the employer has engaged in conduct requiring the election to be set aside. We will not grant such relief, however, unless the election be set aside upon meritorious objections filed in the representation case. Were the election not set aside

> on the basis of objections in the present representation case, we would not now direct a bargaining order even though the unfair labor practice phase of this proceeding itself established the employer's interference with the election." [Citation in brackets supplied.]

Those objections may only be based upon post-petition events. Goodyear Tire & Rubber Co., 138 NLRB 453, 51 LRRM 1070 (1962).

The alleged Section 8(a)(1) violations found by the Administrative Law Judge to have been committed during the critical period involve five events:

(1) The October 8 conversation with Ballou;

(2) The November 15 conversation with Ballou;

(3) Asking Passino how he would vote on October 15;

(4) Asking Robinson how he would vote on November 27; and

(5) Isadore Tabachneck's statements on November 30 at the Orchard Grill.

Avrum Tabachneck's conversation with Mr. Passino, posing a credibility question, is of no consequence even if Mr. Passino's version is credited. In similar situations, the Board has not found an 8(a)(1) violation or improper pre-election misconduct in such casual inquiries to known union supporters as, "How many do you have signed up?", "Do you know how you are going to vote?", "Why are you against me?", and "How come you are not for me?"

Olin Conductors, 185 NLRB 467, 76 LRRM 1691 (1970); Schrementi Bros., Inc., 179 NLRB 853, 72 LRRM 1481 (1969).

The foregoing comments are equally applicable to Avrum Tabachneck's November 27 conversation with Mr. Robinson.

None of the four conversations with employees were initiated by Trading Port personnel; all of them were initiated by the employees.[25] There was no evidence that Ballou, Passino or Robinson communicated whatever they claimed to have been Avrum Tabachneck's remarks to any other employee.

As for the Orchard Grill incident - even crediting Messrs. Dillenbeck and Ballou's versions - Isadore Tabachneck's remarks constituted no threat of reprisal to Dillenbeck, and his statement to Ballou was non-coercive. Reading their testimony in the context of the event, the Administrative Law Judge should not have inferred any violation based upon Isadore Tabachneck's remarks. The Administrative Law Judge mis-assessed that testimony, and the Board is likely to reverse his determination based upon that mis-assessment. I.U.E., Local 806 v. NLRB, 434 F.2d 474, 73 LRRM 2803 (D.C. Cir. 1970)

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[25]This fact is in marked contrast to General Counsel's unsupported claim that Isadore, Sam and Avrum Tabachneck and Brunelle "persistently attempted to pry into employee union activities and sympathies". (Brief for petitioner-appellant, page 37). Nor is there any credible basis for General Counsel's claim that the three Tabachnecks and Brunelle stated, ". . . that unionization of the warehouse would lead to a permanent closing of the warehouse." (Brief for petitioner-appellant, page 37)

In assessing the impact and probable effect of statements as election interference, words must be taken in their context and setting in order to avoid what Judge Friendly has described as the "fallacy of the lonely fact." NLRB v. General Stencils, Inc., 472 F.2d 1703, 82 LRRM 2081, 2082 (2d Cir. 1972).

With respect to the alleged Section 8(a)(3) violations, Trading Port sustained its burden of proving that it had legitimate and substantial business justification for not returning employees to active employment on October 1, and for notifying certain employees on November 1 that positions were not available. (Point 5, page 23, supra.) Moreover, counsel for the General Counsel failed to sustain his burden of proving that Trading Port followed an unlawful discriminatory policy in returning strikers to available positions. (Point 6, page 31, supra.)

The Board has stated its standards for setting aside an election in its Thirty-Fourth Annual Report, page 67, as follows:

> "An election will be set aside and a new election directed, if the election campaign was accompanied by conduct which, in the Board's view, created an atmosphere of confusion or fear of reprisals or which interfered with the employees' exercise of their freedom of choice of a representative as guaranteed by the Act. In evaluating the interference resulting from specific conduct, the Board does not attempt to assess its actual effect on the employees, but rather concerns itself with whether it is reasonable to conclude that the conduct tended to prevent the free information and expression of the employees' choice. In making this evaluation the Board treats each case on its facts, taking an ad hoc rather than a per se approach in resolution of the issues."

(2) Even If The Election Is Ultimately Set Aside By The Board, The Board Is As Likely To Direct Another Election As It Is To Issue A Bargaining Order.

Under NLRB v. Gissel Packing Co., Inc., 395 U.S. 575, 71 LRRM 2481 (1969), before the Board may issue a bargaining order, it must find that, by virtue of respondent's misconduct, ". . . the possibility of erasing the effects of past practices and of ensuring a fair election . . . by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order . . .". (id at 614, 71 LRRM at 2496).

In NLRB v. General Stencils, Inc., 472 F.2d 170, 82 LRRM 2081 (2d Cir. 1972), denying enforcement of a bargaining order made by a Board majority in 195 NLRB No. 173, 79 LRRM 1608 (1972), respondent's plant manager had told a single employee that if the union came in, he would or might close down the plant. There was no evidence that the employee communicated the plan manager's remarks to any other employee.

The Board labeled this a "threat" and termed it "the most salient violation".

This Court said (id at 173, 82 LRRM at 2082):

"To bring Klugman's alleged remarks to Kretschmer under the

> same rubric as the repeated and detailed threats of plant closure which were the subject of the Court's ruling in Sinclair Co. v. NLRB, decided with Gissel, 395 U.S. at 618-19, 71 LRRM at 2497, is an example of the 'fallacy of the lonely fact' and the further fallacy of using the same word to cover wholly unlikely situations. The Supreme Court detailed at great length the extent, reality, and immediacy of Sinclair's threats of plant closure. 395 U.S. at 587-89, 71 LRRM at 2485. See also NLRB v. Sinclair Co., 397 F.2d 157, 159, 68 LRRM 2720 (especially note 5), 160 (1 Cir. 1968). In contrast, Klugman's remarks, if made, went little beyond the truism that an employer can shut a plant at any time. American working men are bright and sturdy enough to know this, and also to know how unlikely it is that a small local employer will in fact close down a flourishing operation simply in a fit of pique."

Continuing, the Court said, (id at 175, 82 LRRM at 2084):

> "We fault the majority . . . because of its blowing up bits and pieces to arrive at a conclusion not justified by a fair reading of the record as a whole."

It is significant that, in all the evidence which counsel for the General Counsel offered in this case, there isn't a single one of the more egregious violations of far-reaching and coercive impact considered sufficient to warrant a bargaining order, per se. There is no credible evidence of (1) a direct threat of loss of employment, whether through plant closure, discharge, or layoff, General Stencils, Inc., 195 NLRB No. 173, 79 LRRM 1608 (1972), enf. denied, 483 F.2d 350, 83 LRRM 2657 (2d Circ. 1973);

(2) the granting of wage or benefit increases, Soil Mechanics Corp., 200 NLRB No. 60, 81 LRRM 1562 (1972); or (3) repeated violations of 8(a)(3), General Stencils, Inc., supra, Chairman Miller dissenting.

Indeed, in this case, too, it would require "blowing up bits and pieces" of isolated conversation and giving them exaggerated immediate and lingering coercive effect to even suggest that a bargaining order under Gissel is appropriate here.

In cases involving conduct far more serious than any proven here, the Board has concluded that the violations found were neither so extensive in nature nor so pervasive in character as to warrant a bargaining order. In the following cases, the Board declined to issue bargaining orders because, in the factual context of the particular case, the employer's independent unfair labor practices did not seriously disturb the election process:

> Franklin Park Mall, Inc., 212 NLRB No. 13, 87 LRRM 1255 (1974). The Board found five 8(a)(1) violations: interrogating employees concerning their reasons for engaging in union activities; promising raises if the union were rejected; soliciting employee grievances during the organizing campaign; giving employees bonuses and better equipment while representation proceeding was pending; and telling employees that no wage increase could be given while "union matter" was pending although employer had

established practice of conducting periodic wage reviews. The Board held these acts of unlawful interference were not so serious and pervasive as to preclude the holding of a fair election.

J. J. Newberry Co., 202 NLRB No. 53, 82 LRRM 1584 (1973) "Rather, we find that the Board's conventional remedies are sufficient to neutralize the effects of the only unfair labor practices found herein; namely, creating the impression of and engaging in surveillance, interrogating one employee, and discriminatorily refusing to permit one employee to attend employees' meetings."

R. & M. Electric Supply Co., 200 NLRB No. 59, 81 LRRM 1553 (1972) Interrogation directed at two of the nine unit employees, even when considered with a threat of futility concerning union organization, was not of such character to justify a bargaining order.

Servico Protective Covers, Inc., 199 NLRB No. 160, 81 LRRM 1370 (1972) Employer's isolated interrogation of employees concerning their union activities, threatened reprisals against employees who were peacefully picketing, and physical disruption of peaceful picketing, were not considered so serious or extensive as to be unredressable by the Board's ordinary remedies.

Ring Metals Company, 198 NLRB No. 143, 81 LRRM 1001 (1972) Two instances of interrogation, the solicitation of grievances, and an implied promise of benefits taken cumulatively and in their factual context, were not considered to have such a lingering effect that any residual effects stemming from them could not be dispelled by the traditional remedies for such violations.

Motown Record Corp., 197 NLRB No. 176, 80 LRRM 1545 (1972) The Board found seven independent 8(a)(1) violations, including a threat to the tenure of employees and interrogation directed at two employees unaccompanied by threats of reprisal or promise of benefits. It said, "But none of them were directed at the employees in general, none of them seriously

jeopardized the employees' job security, no specific benefits were promised, and, taken in their context, none could have so affected the employee or employees involved to such an extent that they could not cast a free and uncoerced ballot after the application of the Board's remedies."

Claremont Poly-Chemical Corp., 196 NLRB No. 75, 80 LRRM 1130 (1972) Two incidents involving promises of benefits and threats of plant closure were not considered sufficiently serious in their context as to justify the issuance of a bargaining order under Gissel.

Action Advertising Co., 195 NLRB No. 122, 79 LRRM 1455 (1972) Of the several violations alleged, the only violations were three instances of interrogation directed at two out of the nine unit employees. The Board said, "In our view, the 8(a)(1) violations clearly fall within the category described by the Court in Gissel, as 'minor or less extensive unfair labor practices, which, because of their minimal impact on the election machinery, will not sustain a bargaining order'."

Restaurant Associates Industries, 194 NLRB No. 172, 79 LRRM 1145 (1972) Promises to striking employees of individual raises and improvements, a job offered to the union ringleader to induce employees to discontinue their union activities, and a statement to an employee as to the futility of their unionization, taken together and in the total factual context of the record, were "not so likely to have an inevitably lingering effect as to preclude the holding of a fair election."

New Alaska Development Corp., 194 NLRB No. 137, 79 LRRM 1065 (1972) Threats of reprisal and dire consequences directed at two out of the nineteen unit employees during an extended period of union activity were considered to fall within the category of "minor or less extensive unfair labor practices, which, because of their minimal impact on the election machinery, will not sustain a bargaining order."

Olin Conductors, 185 NLRB 467, 76 LRRM 1691 (1970) Employer's soliciting and rectifying employee grievances, statement to employees that bargaining would "start from scratch", and implied promise of benefits were considered sufficient to warrant

setting aside the election but were neither so extensive nor so pervasive as to require a bargaining order.

Central Soya of Canton, 180 NLRB 546, 73 LRRM 1069 (1970) Unlawful one-day prohibition of union badges, temporary suspension of nine employees for refusing to comply with the unlawful rule and withholding four hours' pay, not considered so extensive and pervasive as to jeopardize the election process.

Blade-Tribune Publishing Co., 180 NLRB 432, 73 LRRM 1041 (1969) Interrogation of employees concerning their union sympathies, suggesting to three of the twenty-four unit employees the possibility of new benefits, and the changing of one union adherent's work schedule did not jeopardize the election process.

Schrementi Bros., 179 NLRB 853, 72 LRRM 1481 (1969) Suggesting that union victory might jeopardize holiday pay, and interrogating of employees concerning their union activities and sympathies, while sufficient to warrant setting aside the election, were not so extensive or pervasive as to require a bargaining order.

(3) The Court Below Correctly Ruled That It Would Not Be Just And Proper To Direct Trading Port To Recognize And Bargain With The Union In the Circumstances That Trading Port Had No Bargaining Relation With The Union And Its Employees Had Overwhelmingly Rejected The Union In An Election Valid Until Set Aside On Meritorious Objections.

Unlike the order enjoining Sections 8(a)(1) and (3) violations, an order which merely prohibits unlawful misconduct in the future, an order enjoining recognition and bargaining with the Union in the circumstances of this case is radical relief. It would establish a wholly new relation, undo the expression of em-

ployee choice in the election, and have far-reaching consequences.

As previously pointed out, Trading Port's employees rejected the Union 25 to 3 in an election; for a bargaining order to issue, that election must first be set aside on meritorious objections; there is no probable cause to believe that the Board will set the election aside; and, finally, if it does, the Board is as likely to direct another election as it is to issue a bargaining order.

In these circumstance, the court below quite properly left it for the Board to determine, on the record and Trading Port's exceptions, whether the objections to the outcome of the election are meritorious - so that it should be set aside - and, if so, whether the appropriate remedy is another election or a bargaining order.[26] These matters are peculiarly suited to be determined by the Board in the first instance.

Section 10(j) empowers a District Court to grant such temporary relief or restraining order as it deems "just and proper". Trading Port's employees have rejected the Union in an election conducted under Section 9 of the Act. A Section 10(j) bargaining order would not only require the

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[26]The court below did not erroneously conclude that a bargaining order "could not" be granted in a Section 10(j) proceeding, as claimed at pages 34-35 of General Counsel's brief; instead, it correctly concluded that such relief should not be granted in the circumstances of this case.

establishment of a wholly new relationship, and thus do more than merely maintain or preserve the status quo, but more importantly, it would force upon Trading Port's employees a statutory representative they had rejected. Accordingly, we believe the court below correctly ruled that it would not be just and proper to direct recognition and bargaining in the circumstances of this case.

Moreover, we know of no case in which a district court has granted a temporary injunction requiring an employer to recognize and bargain with a union which its employees have rejected in an election.[27]

At pages 33-34 of his brief, General Counsel submits "that General Electric states an incorrect standard for injunctive relief in Section 10(j) proceedings and should not be adhered to by this Court". We submit that General Electric states a correct standard and this Court should adhere to it. However, whether or not this Court adheres to General Electric, it should, in the circumstances of this case, affirm the court below insofar as it refused to direct recognition and bargaining.

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[27] At page 52 of his brief, General Counsel states that District Courts have granted 10(j) bargaining orders to "nonincumbent unions", citing LeBus v. Manning, Maxwell & Moore, 218 F. Supp. 702 (W.D. La. 1963); Smith v. Old Angus, Inc. of Maryland, 81 LRRM 2941 (D. Md., 1972); Henderson v. Gibbons & Reed, et al., 53 CCH Lab. Cas. Para. 11,081 (D. N.M., 1966); and Reynolds v. Herron Yarn Mills, 53 CCH Lab. Cas. Para. 11, 347 (W.D. Tenn., 1966). The cited cases are unlike the present case. In LeBus and Reynolds, the unions had won elections and been certified. In Smith and Henderson, no elections had been held. None of the cited cases support the proposition that a bargaining order should be issued when, as here, employees have rejected a union in a Board-conducted election.

In McLeod v. General Electric Co., 366 F.2d 847, 63 LRRM 2065 (2d Cir. 1966), vacated for remand to District Court for evidence on supervening events, 385 U.S. 533, 64 LRRM 2129 (1967), Circuit Judge Kaufman wrote,

> "It is black-letter law that the issuance of an injunction is an extraordinary remedy indeed. This is especially true in the labor field where Congress by the Norris-LaGuardia Act deprived the federal courts of jurisdiction to issue injunctions in labor disputes. One exception to this almost blanket prohibition was carved out by Congress in Section 10(j) of the National Labor Relations Act empowering the Board to seek in the appropriate case a temporary injunction in the district court when a complaing charging an unfair labor practice had been issued and was pending before the Board. This section in no way changed the extraordinary nature of the injunctive remedy. Nor did it change the basic purpose of the NLRA which envisaged a system in which the Board would, in the first instance, consider and decide the issues arising under the Act and pending before it, subject to later review by the Courts of Appeals. The Board, generally, has properly restricted itself to seeking injunctions only in cases of extraordinary circumstances, exercising its power 'not as a broad sword, but as a scalpel, ever mindful of the dangers inherent in conducting labor management relations by way of injunction.' The courts have generally issued section 10(j) injunctions only to preserve the status quo while the parties are awaiting the resolution of their basic dispute by the Board."

The bargaining order in this case would not preserve but would alter the status quo, requiring Trading Port to perform the Section 8(d) duty to meet and confer in good faith and execute a written contract incorporating any agreement reached with a union its employees had rejected as their statutory representative.

Speaking of Section 10(j), in Kaynard v. Lawrence Rigging, Inc., not

officially reported, 80 LRRM 2600 (E.D.N.Y. 1972), District Judge Dooling wrote (at 2604):

> ". . . its purpose is to designate the implementing tribunal in which the Board may seek such preliminary relief as the occasion requires on the familiar principles of equity jurisprudence, including, of course, the nature of the Board case, the kind of specific final relief to which it is addressed and the urgency attending the case."

In Lawrence Rigging, Inc., supra, there had been no election. General Counsel sought a bargaining order. The court said (at 2604):

> "Considering first the request for an injunction against refusal to recognize and bargain with Local 455 as the exclusive bargaining representative of respondent's employees . . . and directing the respondent affirmatively to bargain collectively upon request with Local 455 as the exclusive collective bargaining representative: to bring about that consequence as preliminary interim relief would go too far . . . it has not the intrinsic quality of preserving the status quo or keeping intact the subject matter which is before the Labor Board for adjudication, and . . . it would invade an area exclusively preserved to the administrative-legislative adjudicatory powers of the Board."

Finally, declining to order the employer to recognize and bargain with the union, the court said (id. at 2605):

> "The status quo would not be preserved by such an order but materially altered in significant legal bearings. Nor, in the light of Gissel, would the injunction serve an essential office by preserving the subject matter of adjudication. Gissel stands for the proposition that the Board is empowered to relieve by its final order against the very dissipation of allegiance which lapse of time coupled with employer instructions may have created. The cases which have imposed a duty to bargain collectively by preliminary injunction have done so because the injunction preserved a dynamic that existed as a law of

> action prevailing between employer and employees at the time the need for Board and Court intervention arose. (Citations omitted.) Existing bargaining relations interrupted by an allegedly unfair labor practice are continued pending the determination of the question whether or not they have been altered or terminated fairly or by an unfair labor practice. The present is not such a case, but one in which Local 455 seeks to create for the first time a collective bargaining relation, a status and a set of reciprocal collective bargaining rights and duties which did not exist, and which - in the abstract - cannot be determined to have existed until the Board has spoken."

In Fuchs v. Steel-Fab, Inc., 356 F. Supp. 385 (D. Mass. 1973), as here, there had been an election, and the employees had rejected a Union. The union filed Section 8(a)(1), (3) and (5) charges and objections to conduct affecting the results of the election. There too, the Regional Director issued a complaint, consolidated the representation and unfair labor practice charge cases for hearing, and petitioned for, among other things, a 10(j) bargaining order. Denying that relief, the court said (id. at 387):

> "[T]o grant injunctive relief which, in effect, would require respondent to bargain with the Union, would actually disregard the status quo and create a bargaining agreement [sic.] which does not now exist. This is not a case where existing bargaining relations between a Union and a company, which are interrupted by an allegedly unfair labor practice, are continued by injunctive relief pending the outcome of the legal matter before the Board. The Court finds that petitioner in the instant case seeks to create a collective bargaining relation through an injunction. The set of rights and duties imposed does not exist and can not be determined to have existed until the Board resolves the case."

The court below justifiably relied on General Electric, Lawrence Rigging, Inc., and Fuchs, all supra, in tailoring relief as it did.

Conclusion

We respectfully submit that the court below correctly found it would be unjust and improper to issue a bargaining order in this proceeding. Its order should be affirmed.

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December 1974

United States Court of Appeals
For The Second Circuit

THOMAS W. SEELER, Regional Director of the Third Region of the National Labor Relations Board, for and on behalf of the NATIONAL LABOR RELATIONS BOARD,

Petitioner-Appellant,

-against-

THE TRADING PORT, INC.,

Respondent-Appellee.

Certificate of Service

Docket No. 74-2150

I hereby certify that on December 4, 1974, two copies of Respondent-Appellee's Brief was mailed first class to Marvin Roth, Deputy Assistant General Counsel, National Labor Relations Board, Washington, D. C., 20570, attorney for Petitioner-Appellant.

Edward L. Bookstein

(Edward L. Bookstein)

Dated at Albany, New York,

December 4, 1974.